Concurring and Dissenting Statement of Commissioner J. Thomas Rosch
Regarding Google's Search Practices

In the Matter of Google Inc., FTC File No. 111-0163

January 3, 2012

The Commission has voted to close its.8(i)0163

community have urged the Commission on many occasions not to expand the scope of Section 5 without a clear explanation of the reach of this statute. The lack of any limiting principles is particularly problematic in this case given that remedies already exist for misappropriation under copyright and tort law. *Cf. Verizon Communications v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 412 (2004) (counseling against an expansion of the antitrust laws where other legal structures already exist "to deter and remedy anticompetitive harm").

Furthermore, the federal courts have cautioned against the use of Section 5 where that would unsettle settled Section 2 case law. *See Boise Cascade Corp. v. FTC*, 637 F.2d 573, 581-82 (9th Cir. 1980) (rejecting a Section 5 claim when there was "well forged" antitrust case law governing the conduct, lest it "blur the distinction between guilty and innocent commercial behavior"). To the extent a standalone Section 5 claim is based on a refusal to deal or conditional refusal to deal theory, Section 5 cannot be used to evade the requirements of the Supreme Court's *Trinko* decision.

Third, I am aware not aware of any evidence of any actual injury to consumers (whether end users or advertisers) or competition as a result of Google's conduct. This lack of injury conflicts with the Commission's unanimous statement to Congress that in any Section 5 case, there must be "clear harm to the competitive process and to consumers."[4] Furthermore, the Supreme Court has, in an oft-quoted passage, cautioned that the antitrust laws are for "the protection of competition, not competitors." *Brooke Group. Ltd. v. Brown & Williamson Tobacco Corp*., 509 U.S. 209, 224 (1993) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)); *see also FTC v. Klesner*, 280 U.S. 19, 27-28 (1929) (Section 5 proceedings must be premised on the "protection of the public," not the vindication of private rights). In any event, the investigation revealed that the alleged "victims" of Google's scraping were *not* injured: overall traffic to the alleged victims increased substantially while the alleged scraping was occurring and traffic to these websites from Google grew at an even faster rate.

Any claim that Google's alleged scraping harmed innovation is likewise lacking in factual support. The deficiency of evidence in this regard is not surprising, given the limited scope and duration of Google's alleged scraping.[5] Marketplace developments also cast doubt on the likelihood of harm to innovation. Vertical search engines—including the alleged "victims" of Google's scraping—have continued to thrive and expand, and entry has continued apace since this conduct occurred. Any assumption that there has been harm to innovation, despite all evidence to the contrary, is also in tension with the fair use doctrine, under which the limited use of another's work without permission is not deemed to harm innovation. *See* 17 U.S.C. § 107.

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[4] Prepared Statement of the Federal Trade Commission Before the United States Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, How the Federal Trade Commission Works to Promote Competition and Benefit Consumers in a Dynamic Economy (June 9, 2010), *available at* http://www.ftc.gov/os/testimony/100609dynamiceconomy.pdf.

[5] The scraping of the two websites supplying local information occurred for about a year. The scraping of the shopping comparison website ended just a few months after that website raised its concerns with Google.

Finally, I am concerned that the majority's apparent position that scraping is a violation of Section 5 of the FTC Act will put the FTC in the position of becoming the enforcer of the copyright laws on the Internet—a task for which it has neither the resources nor expertise, and was surely not envisioned by Congress. As any casual user of the Internet knows, many websites make use of other websites' content; indeed, the business model for many popular websites is based on aggregating or summarizing the content of other websites.[6] As a result of the majority's apparent condemnation of scraping, the legality of these aggregators may be called into question, and the Commission may be inundated with rent-seeking complaints from firms like the alleged "victims" here.

<u>Multihoming Restrictions</u>

Google has also committed to eliminate a particular restriction on the use of its AdWords search advertising platform. Previously, Google'

manage an ad campaign across different platforms. Larger advertisers, in fact, did this. Also, the restriction did not prevent users from exporting AdWords data onto a rival's platform. This could be done manually or from a rival platform's software, as Google's principal search rival acknowledged.[9]

Second, there is no precedent for this theory of liability. No federal court has ever found liability for similar conduct. The Supreme Court has held that refusals to assist competitors are not illegal under Section 2 except in unusual circumstances. *See Verizon Communications v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp*., 472 U.S. 585 (1985). Following the Supreme Court's decision in *Trinko*, most courts of appeals, including the circuit in which Google is based,[10] require a unilateral termination of a profitable prior course of dealing to establish such a claim. That would not be satisfied here because Google's API restriction has been in place since Google introduced the AdWords API in 2005. Furthermore,

Third, Google's justification for the API restriction—ensuring that third-party intermediaries take advantage of the unique features available on AdWords—is supported by numerous documents going back at least six years.[12] It is also noteworthy that Google introduced the restriction in 2005, when its market share was a fraction of its current share. This suggests that there were legitimate business reasons, not an exclusionary purpose, behind the restriction.

Fourth, I am concerned that imposing a duty on monopolists to allow their customers to interoperate and share data with rivals could discourage innovation, particularly in the software industry. *See* Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 775c (2012) ("Any judicial rule for condemning possibly anticompetitive innovation under the antitrust laws must be formulated so as not to discourage the great majority of innovations that are competitive.").

Finally, insofar as one of the alleged disadvantaged rivals is Microsoft, I have seen no evidence that it lacks the resources to file its own private antitrust action—instead of "free riding" on a government action to achieve the same result.

Settlement Procedure

Instead of following standard Commission procedure and entering into a binding consent agreement to resolve the majority's concerns, Google has instead made non-binding commitments with respect to its search practices. Only two of my colleagues have concluded that these nonbinding promises are an acceptable means of resolving their concerns with Google's search practices.[13] (Commission Statement on Search at 1. n.2.) More importantly, our "settlement" with Google creates very bad precedent and may lead to the impression that well-heeled firms such as Google will receive special treatment at the Commission.

The FTC's Rules of Practice permit settlements to resolve potential violations of the FTC Act. These settlements must be in the form of a *consent order*. FTC Rule 2.31, 16 C.F.R. § 2.31. Consent orders typically include admissions of jurisdictional facts, a waiver of the FTC's

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[12] Even the Commissioners expressing "strong concerns" about Google's API restriction apparently recognize the legitimacy of Google's justification, as Google will continue to be able to require that third-party tools used to synchronize advertising campaigns offer certain minimal functionality.

[13] As precedent for their acceptance of Google's non-binding commitments, Chairman Leibowitz and Commissioner Brill point to the FTC's 2001 investigation of the acquisition of Pillsbury by General Mills. That case, however, has no bearing here. In General Mills, the respondents offered *structural relief* that, unlike the *conduct relief* offered by Google, (1) could not be unilaterally reversed by the respondents and (2) did not require ongoing Commission oversight to ensure compliance. Furthermore, even the two Commissioners that found the relief in General Mills acceptable stated that they "strongly preferred that these commitments be memorialized in a formal Commission order, consistent with usual practice." Statemey Google7s Ors7(ss)ila1eu

exception has no application here because, for the reasons previously stated, Google can resume engaging in its alleged scraping or API restrictions at any time, without penalty.

Conclusion

The Commission's mission is to protect competition and consumers. The proposed "settlement" here will do the opposite. The Commission's acceptance of a commitment letter to resolve an alleged violation of the antitrust laws is an unjustified and dangerous weakening of the Commission's law enforcement authority. Going forward, parties under investigation are likely to demand similar treatment. Failure to do so would imply that Google has received preferential treatment in this investigation.

In addition, the seeking of relief by some of my colleagues for Google's scraping and API restrictions—practices that are legal under the Sherman Act—puts the Commission's standalone Section 5 authority at severe risk. Congress would be unlikely to stand idly by if the Commission continues to challenge conduct under Section 5 without explaining the limiting principles of that authority. The majority's exercise of that authority in this case is particularly problematic and deserving of scrutiny given the utter lack of evidence that Google's actions have harmed consumers or competition—the bare minimum requirements for the use of Section 5.

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duration" of the conduct and the company's "swift and voluntary action" to rectify the conduct); Closing letter, Genelex Corp., FTC File No. 072-3128 (Aug. 14, 2009) (closing advertising practices investigation based on the company's discontinuation of the marketing activities at issue and its "representations that the company has no plans to market [similar products] in the future"); Closing letter, Baby Bee Bright Corp., FTC File No. 082-3018 (Mar. 23, 2009) (closing advertising practices investigation based on "changes made recently" to the company's marketing and representations that future advertising claims will be adequately substantiated); *see also FTC v. Evans Prods. Co.*, 775 F.2d 1084 (9th Cir. 1985) (affirming a denial of preliminary injunctive relief where the offending conduct had completely ceased three years before the complaint was filed and was not likely to recur).